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IN THE

Supreme Court of the United States

October Term, 1969.

No. 1379.

NELSON A. ROCKEFELLER, Governor of the State of New York; HOLLIS S. INGRAHAM, Commissioner of Health of the State of New York; GEORGE K. WYMAN, Commissioner of Social Services of the State of New York; and T. NORMAN HURD, Director of the Budget of the State of New York,

Defendants-Appellants,

against

CATHOLIC MEDICAL CENTER OF BROOKLYN AND QUEENS, INC., DIVISION OF ST. MARY'S HOSPITAL; THE NIAGARA FALLS MEMORIAL HOSPITAL; and other hospitals similarly situated,

Plaintiffs-Appellees.

MOTION TO DISMISS OR AFFIRM.

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Plaintiffs-Appellees.

MOTION TO DISMISS OR AFFIRM.

The plaintiffs-appellees (hereinafter referred to as plaintiffs) move this court to dismiss the appeal herein or, in the alternative, to affirm the declaratory judgment of the Three-Judge District Court of the Eastern District of New York on the ground that it is manifest that the questions on which the decision of the case depends are so insubstantial as to require no further consideration, and on the further ground that the decision below was so clearly correct, that there is no reason for this court to consider the matter further.

I.

Statute involved.

This appeal involves the validity of the provisions of the Public Health Law of the State of New York, §2807 (2), as amended by Chapter 957 of the Laws of 1969, in light of the provisions of 42 U. S. C. §1396a(a)(13)(D). Defendants-appellants have correctly set forth the provisions of Public Health Law §2807(2), as amended by Chapter 957 of the Laws of 1969. 42 U. S. C. §1396a (a)(13)(D) provides:

> A State plan for medical assistance must provide for payment of the reasonable cost (as determined in accordance with standards approved by the Secretary and included in the plan) of inpatient hospital services provided under the Plan.

II.

Questions presented.

Defendants-appellants (hereinafter referred to as defendants) have listed, on pages 4 and 5 of the Jurisdictional Statement, six questions which they urge this court to consider. It is submitted that only one question is presented by this appeal: Was the District Court correct in holding that Public Health Law §2807(2), as amended by Chapter 957 of the Laws of 1969,[1] is in conflict with 42

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[1]Public Health Law §2807(2) as amended by Chapter 957 of the Laws of 1969 provides:

> Payments for hospital service and health-related service made by government agencies or corporations organized and operating in accordance with article nine-c of the insurance law shall be at rates approved by the state director

U. S. C. §1396a(a)(13)(D) and the regulations thereunder, in failing to conform to the federal mandate that plaintiffs be paid the reasonable costs of the services they furnish?

III.

Statement of the case.

Plaintiffs agree with defendants' Statement of the Case except in the following particulars:

1. Defendants have misstated the statutory court's treatment of plaintiffs' constitutional claim set forth in their third cause of action (Jurisdictional Statement, p. 8). That court stated, with regard to these claims:

> This court agrees with the statement in the memorandum of the single judge that the claim of deprivation of property without due process of law in the third cause of action is not wholly insubstantial. Therefore, the renewed motion of the defendants to dismiss the amended complaint for lack of subject matter jurisdiction must be denied. 305 F. Supp. at 1260.

(Footnote continued)

> of the budget in the case of government agencies and approved by the superintendent of insurance in the case of corporations organized and operating under article nine-c of the insurance law. Notwithstanding the foregoing, rates of payment for hospital and health-related service made by government agencies, approved by the state director of the budget and in effect March thirty-first, nineteen hundred sixty-nine shall continue in effect for the period ending December thirty-first, nineteen hundred sixty-nine. Rates approved by the state director of the budget for the first time after March thirty-first, nineteen hundred sixty-nine shall continue in effect for the period ending December thirty-first, nineteen hundred sixty-nine.

2. Defendants state (Jurisdictional Statement, p. 7) that the "frozen" rate included a provision for anticipated increases. In fact, the "frozen" rate was intended only to provide for anticipated increases through June 30, 1969, but failed to do even this. (See Exhibit C attached to affidavit of Monsignor James H. Fitzpatrick, Item No. 34 of Index to Record on Appeal.)

3. Defendants characterize the Memorandum and Declaratory Judgment of the lower court as holding that the State of New York must pay "full actual and current costs" to plaintiffs (Jurisdictional Statement, p. 8) but they conveniently neglect to add that the court held that payments to hospitals cannot exceed reasonable charges.[2]

IV.

Argument.

1. The question presented is so insubstantial that it does not require plenary consideration by this court.

Defendants contend that "the issues presented by the appeal are of vital concern to every state participating in a Medicaid program" and more particularly they state that "[o]f far greater concern is the effect the resolution of these issues will have on future efforts of the states to meet the constantly spiraling increase in costs for medical care." Jurisdictional Statement, page 9.

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[2]The court stated: "the foregoing adjudications shall not prevent the State of New York from taking appropriate steps to assure that payments to hospitals are not in excess of reasonable charges consistent with efficiency, economy and quality of care * * *." 305 F. Supp. at 1271.

This contention evidences a lack of understanding of the narrow issue before this court and of the narrow basis for the decision of the lower court. Plaintiffs concede that they may not receive more than their reasonable costs for services rendered. As already pointed out, this was the determination of the court below, and nothing in that decision restricts the right of a state to confine Medicaid payments to hospitals to those costs which are reasonable.

In short, this case could be of broad concern only if the validity of the reasonable cost provision were in issue. However, it is not in issue, for the only question is whether the New York method of attempting to freeze reimbursement rates violated federal law. This is a factual matter, and plaintiffs succeeded below, and should succeed in this court, because they have introduced unrefuted proof that their actual costs were necessarily incurred and therefore reasonable.

Defendants further make an ill-concealed attempt to induce this court to give plenary consideration to the issue involved, even though such consideration is clearly not required. By examining the questions posed by defendants, the inherent weakness of their position is demonstrated vividly.

Defendants second question (Jurisdictional Statement, p. 5) incorrectly condenses the decision of the lower court. It indicates a holding that the State of New York had to provide payment for the full and current costs incurred by the hospitals for inpatient services without regard to whether such costs are reasonable. This is untrue. The court below did hold that the State of New York, so long as it participates in the Medicaid program, must provide for payments to hospitals of the "full actual and current costs of inpatient hospital services." 305 F. Supp. at 1271.

However, the court also held that "the foregoing adjudications shall not prevent the State of New York from taking appropriate steps to assure that payments to hospitals are *not in excess of reasonable charges* consistent with efficiency, economy, and quality of care * * *." 305 F. Supp. at 1271. (Italics added.)

Defendants' third question asks if the district court should have awaited a final determination by the Department of Health, Education and Welfare of the validity of the statute under attack. This question is moot, for the Department of Health, Education, and Welfare has already stated its position. In its interim memorandum, 305 F. Supp. 1256, the three-judge court invited the Department of Health, Education and Welfare, (hereinafter referred to as HEW) to submit a brief, *amicus curiae*, setting forth its position with respect to the matters in issue. By extending this invitation, the lower court complied with this court's direction that the district courts should obtain the views of HEW whenever possible. *Rosado v. Wyman*, U. S. (No. 540, October Term, 1969) (p. 8 of opinion). HEW submitted a brief (Item 40 of Index of Record on Appeal), and HEW stated: "There must be retroactive adjustments or an allowance in lieu of retroactive payments so that the hospitals are paid the full actual and current costs of the services furnished to eligible individuals" (page 6 of HEW Brief, Item 40 of Index to Record on Appeal). The declaratory judgment was not rendered until HEW acted by means of the foregoing brief.

Defendants seem to urge, however, that court action should have awaited further consideration by HEW; that is, that the doctrine of primary jurisdiction should be applied. There is no reason to include, within the purview of this doctrine, the concept that administrative review must proceed to the highest level of the administrative process. There is "no fixed formula" for applying the doctrine and "[i]n every case the question is whether the reasons for the existence of the doctrine are present and

whether the purposes it serves will be aided by its application * * *." *United States v. Western Pacific R. Co.*, 352 U. S. 59, 64 (1956). In light of the reasons for invoking the doctrine (uniformity of result and use of administrative expertise), *Allied Air Freight, Inc., v. Pan American World Airways, Inc.*, 393 F. 2d 441, 449 (2d Cir. 1968); cert. den. 393 U. S. 846 (1968), the doctrine has no applicability in this case.[3]

There is no complex administrative scheme under attack here. As already pointed out, the dispute here is factual only, and in determining whether the freeze deprives hospitals of payment for their reasonable costs, the court may make such a determination as well as the agency. Since the dispute is factual, any administrative decision would not contribute to uniform treatment of other hospitals in other states.

Not only are the reasons for invoking the doctrine of primary jurisdiction absent, but there is nothing in the Medicaid statute giving plaintiffs the right to initiate agency action. See, also, page 12 of HEW Brief (Item 40 to Index of Record on Appeal). Since no such procedure is available, the defendants' contention must be rejected. *Rosado v. Wyman, supra* (p. 8 of opinion); *Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U. S. 676, 687 (1965).[4] An examination of cases dealing with the exhaustion of administrative remedies buttresses this conclusion, for these cases hold that an aggrieved party must have some way of invoking agency

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[3]The lower court stated: "Given the limitations on HEW's power to take action that will protect the rights of providers of services, its statement that the New York freeze is inconsistent with federal requirements, and the apparent state purpose to act in conformity with federal requirements, it is appropriate here for the court to adjudicate the questions present by the complaint." 305 F. Supp. at 1270.

[4]The court stated: "we must reject the unions' primary-jurisdiction contention because of the absence of an available procedure for obtaining a Board determination."

action in order for that doctrine to apply. *Webb v. United States*, 21 F. R. D. 251 (E. D. Penn. 1957); *Pollard v. United States*, 151 F. Supp. 487 (Ct. Cl. 1957); *Civil Aeronautics Board v. Modern Air Transport*, 81 F. Supp. 803 (S. D. N. Y. 1949). While the theory of primary jurisdiction and that of exhaustion of administrative remedies are somewhat different, they are "closely allied in [their] basic function[s] and concept[s]." Jaffe, *Primary Jurisdiction*, 77 Harv. L. Rev. 1037 (1964). Primary jurisdiction has been spoken of in exhaustion terms. *Rosado v. Wyman*, *supra* (p. 4 of concurring opinion, J. Douglas); *Allied Air Freight, Inc., v. Pan American World Airways, Inc.*, 393 F. 2d 441, 443 (2d Cir. 1968); cert. den. 393 U. S. 846 (1968); *Adler v. Chicago & Southern Air Lines, Inc.*, 41 F. Supp. 366, 367 (E. D. Mo. 1941).

Finally, in urging the application of the doctrine of primary jurisdiction, defendants ignore plaintiffs' need for a final disposition of this matter. Members of the class represented by plaintiffs are in desperate financial straits as a result of the freeze. 305 F. Supp. at 1256. Delay in disposing of this case would be intolerable, and tantamount to a judgment against some hospitals. See, *Smith v. Illinois Bell Telephone Co.*, 270 U. S. 587, 591 (1926).

In question 4, defendants ask whether the lower court erred in failing to find HEW regulations inconsistent with the "reasonable cost" standards of 42 U. S. C. Sections 1396a(a)(13)(D) and 1396a(a)(30). The regulations were not and are not now under attack. In any event, the regulations do provide for payment of "reasonable costs." Handbook of Public Assistance Administration (Supplement D) Section D-5362. Even if the regulations could be construed as lacking this requirement, defendants could not be harmed by such construction since the lower court specifically provided that payments must be reasonable.[5]

The fifth question presented by defendants is whether the district court erred in convening the statutory three-

[5] See discussion, pages 5 and 6, *supra*.

judge court "in the absence of substantial constitutional questions." The lower court correctly held that the constitutional questions were not "wholly insubstantial." 305 F. Supp. at 1260. The use of this term is not meant to denigrate plaintiffs' claims, for the term signifies that the requisite test for convening the three-judge court has been met. *Bailey v. Patterson*, 369 U. S. 31, 33 (1962); *Powell v. Workmen's Compensation Board of the State of New York*, 327 F. 2d 131, 138 (2d Cir. 1964). Of course, the lower court was "obliged to adjudicate [the] statutory claim in preference to deciding the * * * constitutional claim * * *." *Rosado v. Wyman, supra* (p. 3 of opinion). It was for this reason that the court decided the statutory claim without more fully considering the constitutional claim.

An examination of plaintiffs' complaint that there was a deprivation of property without due process of law makes clear that a substantial constitutional question was raised requiring consideration by the three-judge court. Plaintiffs claim that the provisions of §2805-a of the Public Health Law as added by Chapter 762 of the Laws of 1969,[5] and §2806(1) of the Public Health Law, as amended by Chapter 419 of the Laws of 1969,[6] in conjunction with

[5] Public Health Law §2805-a states:

> Every general hospital shall admit any person who is in need of immediate hospitalization with all convenient speed and shall not before admission question the patient or any member of his or her family concerning insurance, credit or payment of charges, provided, however, that the patient or a member of his or her family shall agree to supply such information promptly after the patient's admission.

[6] Public Health Law §2806(1) states:

> A hospital operating certificate may be revoked, suspended, limited or annulled by the commissioner or the health services administration of the city of New York, as the case may be, on proof that: * * * (b) a general hospital has refused or failed to admit or to provide for necessary emergency care and treatment for an unidentified person brought to it in an unconscious, seriously ill or wounded condition.

the "freeze" legislation, deprive them of their property without due process of law. Such deprivation is in violation of the Fifth and Fourteenth Amendments to the United States Constitution.* The plaintiffs have never taken the position that the cited statute, requiring the admission of patients to hospitals under the conditions covered thereby, is unconstitutional. On the contrary, plaintiffs have consistently urged that such a responsibility falls upon hospitals, even absent such legislation. It is only that legislation, the subject of this litigation, arbitrarily fixing the maximum amount by which hospitals can be reimbursed by Medicaid, despite the costs incurred by those hospitals in the treatment of patients, which is unconstitutional, in that the same effects a confiscation of the property of the hospitals without due process of law. Section 2805-a does not define who may be in need of "immediate hospitalization," but, as observed by Judge Judd in his initial opinion deciding the necessity for the three-judge court, "it is fair to assume that this term includes a substantial proportion of the persons who arrive at the hospital's doors," Jurisdictional Statement, Appendix A, page 20.

Plaintiffs contend that since profit-making entities may not be deprived of a fair return on their invested capital, *a fortiori*, voluntary hospitals, operating, at best, without profit, are entitled to the same constitutional protection against suffering losses so severe as to jeopardize the

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*The Fifth Amendment to the United States Constitution states: "No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution states:

"* * * [No State shall] deprive any person of life, liberty, or property, without due process of law * * *"

continued existence of the institution. The law is clear that a profit-making entity cannot be deprived of a fair return on its investment. E. g., *Chicago, Milwaukee and St. Paul Ry. Co. v. Minnesota*, 134 U. S. 418, 456 (1890), cited in *Swift & Co. v. Wickham*, 382 U. S. 111, 117 (1965). Manifestly, plaintiffs have asserted a constitutional claim which is not wholly insubstantial. Rather, the claim "presents in a modern setting" the question of when regulation reaches the stage of an unconstitutional taking of property (Jurisdictional Statement, Appendix A, p. 22). That this case was decided on a different constitutional ground should not obscure the substantiality of plaintiffs' constitutional claim.[9]

Finally, in question 6, defendants ask whether the district court erred in ordering this case to be maintained as a class action. At the hearing before the three-judge court, the Assistant Attorney General of the State of New York stated: "I suppose, under the liberal rules of the Federal Rules of Civil Procedure, this could be construed as a class action" (p. 11 of Transcript of Minutes of Hearing, Item No. 39 in Index to Record on Appeal). Defendants, therefore, find themselves in the untenable position of having acceded to the propriety of the order below while asking this court to reverse that order. Even if the court were inclined to do this, it is clear that Rule 23 of the Federal Rules of Civil Procedure is tailor made for the instant action: joinder of all members of the class is impracticable; there are questions of law and fact common to the class; the claims of the representative plaintiffs are typical of the claims of the class; and the claims

[9] "(5) ORDERS and DETERMINES that it is unnecessary to adjudicate the constitutional issues concerning Chapters 419 and 762 of the New York Laws of 1969, set forth in the second and third causes of action in the amended complaint, in view of the adjudications concerning the first cause of action. 305 F. Supp. at 1271.

of the parties will fairly and adequately protect the interests of the class.[10]

Defendants argue that some hospitals have "no quarrel" with New York's method of reimbursement for inpatient services performed for Medicaid patients. (Jurisdictional Statement, p. 14). This ignores the fact that no hospital can be affected adversely by a decision disallowing the "freeze" legislation, for if a hospital receives more than its full, actual and reasonable costs under any formula, it has to repay the extra monies. (pp. 12-13 of Transcript of Minutes of Hearing, Item No. 39 in Index to Record on Appeal).

2. The decision below was clearly correct and should be affirmed.

The unanimous decision below held that Section 2807(2) of the New York State Public Health Law as amended by Chapter 957 of the Laws of 1969 is in conflict with 42

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[10]The court below stated:

During the oral argument, the court ordered that the case could be maintained as a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure as one where the defendants have acted on grounds generally applicable to the class, so that injunctive relief or declaratory relief should appropriately apply to the class as a whole. Since the parties and their counsel purportedly speak for the Hospital Association of New York State, Inc., and substantially all the hospitals in New York State are members of that association and familiar with the institution of the present action, it was determined that adequate notice to members of the class existed. It is therefore unnecessary to decide whether there is any constitutional requirement for notice to class members in situations where F. R. Civ. P. 23(c)(2) does not presently require it. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950); note, Constitutional and Statutory Requirements of Notice under Rule 23(c)(2), 10 Boston Coll. Ind. and Comm. L. Rev. 571 (1969). 305 F. Supp. at 1260.

U. S. C. Section 1396a(a)(13)(D) and the regulations thereunder in forbidding the payment to plaintiffs of "the actual reasonable cost of inpatient services rendered to participants in the New York medical assistance plan * * *." 305 F. Supp. at 1271. This decision was so clearly correct that this court should affirm it without plenary consideration.

Plaintiffs contend that they are entitled to be paid the reasonable costs of inpatient services they provide Medicaid patients. Such requirement is contained in 42 U. S. C. Section 1396a(a)(13)(D) and in Handbook of Public Assistance Administration, Supplement D-5362. Therefore, the only issue before the court below, and before this court, is whether the payments made by defendants compensate plaintiffs for their reasonable costs. It follows, then, that the more narrow question is whether the costs plaintiffs have incurred are reasonable.

The record is replete with unrefuted affidavits and exhibits demonstrating that plaintiffs' costs were necessarily incurred and reasonable within the meaning of the federal statute and regulations. See Handbook of Public Assistant Administration, Supplement D-5364.1(a)(b). Defendants offered not a single fact to contradict the validity of plaintiffs' proof that the freeze legislation failed to reimburse hospitals for their reasonable costs. There can be no basis for defendants' contention since not a single field audit of a hospital had been made (see deposition of William F. McCann, Item 33 of Index to Record on Appeal).

Indeed, defendants' past actions buttress the argument that plaintiffs' costs are reasonable. The Commissioner of Health, on August 20, 1968, determined reimbursement rates for hospitals. This determination necessarily involved a finding that the rates were reasonable and were not inflated by inefficiency or improper charges. 42 U. S.

C. §1396(a)(30).[11] No other reimbursement schedule had been promulgated between August, 1968, and the end of the "freeze" period. Thus, the defendants have not only failed to refute plaintiffs' proofs that their costs were reasonable, but by their own findings have determined that hospitals were operating efficiently.

Defendants repeat again and again, as if by mere repetition they would make it true, that hospitals in the State of New York received payment for their reasonable costs under the Medicaid program. The problem with their repetition is that it is unsupported by even one fact and is refuted by all the evidence before the court.

Defendants rely upon the formula contained in the State Hospital Code, 10 N.Y.C.R.R. Section 770.1 *et seq.* They contend that this formula provided for anticipated increases in costs. Of course, any formula is subject to the requirement that reasonable costs be paid, and for this reason, defendants conveniently obscure two critical facts about their formula:

1. The formula, and the rates promulgated thereunder in August of 1968, did not compensate some hospitals for their reasonable incurred costs prior to the "freeze;"

2. The formula, and rates promulgated thereunder, in August of 1968, were designed only (and inadequately at that) to cover increased costs until June 30, 1969; however, the "freeze" legislation mandated that payments not be increased until after December 31, 1969.

[11] A State plan for medical assistance must provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments (including payments for any drugs provided under the plan) are not in excess of reasonable charges consistent with efficiency, economy, and quality of care.

Defendants argue that New York's method of reimbursing hospitals conforms to HEW requirements. This ignores the statement by HEW that the freeze legislation is not in conformity with its standards, and it further ignores defendants' own statements that there will be no retroactive adjustment or allowance in lieu thereof, as required by HEW, if current payments did not meet reasonable costs (see deposition of William F. McCann, Item 33 in Index to Record on Appeal).

Manifestly, the court below properly granted plaintiffs' motion for summary judgment, for Rule 56(e) of the Federal Rules of Civil Procedure provides that a party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." This has not been done.

3. Other bases for affirmance.

Defendants argue that a basis for reversal is that plaintiffs are non-profit institutions and enjoy tax exempt status. Such a contention is outside the record and not properly before this court. Even if this court were to consider this matter, the argument is without merit. Would defendants place a voluntary hospital, which does not pay taxes, in a worse position than a private corporation which does pay taxes? Do defendants seriously mean that a profit-making hospital should be paid its reasonable costs and a non-profit hospital should not? The specious nature of this position is readily apparent.

Defendants say that Medicaid participation is not required, but is left to the voluntary decision of each hospital, and defendants contend that all hospitals can withdraw from the Medicaid program. As pointed out in the

opinion of Judge Judd, "this right may be illusory" (Jurisdictional Statement, Appendix A, p. 21), for if plaintiffs were to accept defendants' position, the congressional and state committment to provide medical care for the needy would be unattainable. Both the federal government and New York State have recognized their responsibility to provide medical care for the needy, and it is patent that hospitals must remain open if this policy is to be implemented.

Conclusion.

It is respectfully submitted that the questions upon which this case turns are so insubstantial as to require no further argument, and plaintiffs respectfully move this court to dismiss this appeal or, in the alternative, to affirm the memorandum and declaratory judgment entered herein by the Three-Judge United States District Court for the Eastern District of New York.

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